United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1914

B P/S

To be argued by
MICHAEL Q. CAREY

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-1914

UNITED STATES OF AMERICA,
Appellee,

—v.—

RUSSELL DICKERSON,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Russell Dickerson appeals from a judgment of conviction entered on February 22, 1974, in the United States District Court for the Southern District of New York following a four day trial before the Honorable Charles L. Brieant, Jr., United States District Judge, and a jury.

Indictment 73 Cr. 754, filed August 8, 1973, charged Dickerson and Julius Sykes in one count of assaulting a federal officer, in violation of Title 18, United States Code, Section 111.

Dickerson's trial commenced on February 19, 1974.* On February 22, 1974, the jury found Dickerson guilty.

* On August 6, 1973, Julius Sykes, a narcotics addict at the time, expressly waived all rights to a speedy trial and the Second Circuit Rules Regarding the Prompt Disposition of

[Footnote continued on following page]

On June 20, 1974, Judge Brieant sentenced him to two years imprisonment. Dickerson is at liberty on his own recognizance pending appeal.

Dickerson is presently released on his own recognizance.

Statement of Facts

The Government's Case

On July 27, 1973, Special Agents Frank Balasz and David Carroll of the Federal Drug Enforcement Administration, acting in an undercover capacity, were introduced at Venable's Fresh Fruit Market on 127th Street in Manhattan to Russell Dickerson by Bob Barry, the manager of the market (Tr. 28-29). At the conclusion of their conversation, Dickerson agreed to sell Balasz a "machine gun" and two magazines of ammunition for $500 (Tr. 31-32).*

Later that day, Balasz and Carroll met Dickerson on the street where they had met earlier. Carroll parked his car and remained in it while Balasz joined Dickerson in the back seat of an automobile parked across the street from a few car lengths behind Caroll's car (Tr. 34-35). **

Criminal Cases and was admitted into a federal deferred prosecution narcotic addict rehabilitation program pursuant to an agreement signed by the United States Attorney for the Southern District of New York, Sykes and Sykes' attorney and approved by a United States Magistrate for the Southern District of New York and the Project Coordinator. The agreement contemplates the dismissal of the charges against the defendant upon the successful completion of the rehabilitation program.

* Balasz began his undercover work in the neighborhood of Venable's Fresh Fruit Market in a successful attempt to meet persons illegally distributing narcotics. He met Dickerson through the manager of Venable's while conducting an investigation in an undercover capacity of suspected illegal distributions of narcotics and firearms (Tr. 26-28).

** Carroll did not come to Balasz' assistance until the fight was all but over (Tr. 54) and he did not testify at trial.

Moses Young * and Julius Sykes, acquaintances of Dickerson, sat in the front seat of the car (Tr. 41). Dickerson handed Balasz the "machine gun" (Tr. 35).** From a total of $630 in his possession, Balasz then counted out $500 in full view of Dickerson, who subsequently took the money (Tr. 63). Balasz examined the rifle again and noticed what he believed was a malfunction in its operation. Sykes took the rifle and said that he could repair it (Tr. 40-41, 43). A discussion followed between Balasz, Dickerson and Young in which Balasz tried to lower the purchase price since Dickerson had failed to supply more than one magazine of ammunition. At its conclusion Young stated the price remained $500 (Tr. 41). Balasz signaled Carroll to drive up and take the weapon through the car window, but when Carroll drove up Dickerson and Young insisted that he leave (Tr. 41-42).

Dickerson then left the car with the $500 in his pocket (Tr. 42-43). Balasz told Sykes and Young that he was taking the "machine gun" and leaving, but Sykes pointed the rifle at Balasz and said the price was $500 (Tr. 43). Balasz left the car, approached Dickerson and said he wanted either the gun or his money and he was leaving the area. At first, Dickerson ignored Balasz. Later he said he did not have the $500 (Tr. 43-44). Balasz tried to take the rifle from Sykes, who was still in the car, but Sykes elbowed him away (Tr. 44). Dickerson repeated that he did not have the $500 and said maybe Young who had gotten out of the car, had it (Tr. 44). Young then threw Dickerson the car keys when Dickerson asked for them as he was running toward the driver's door (Tr. 44-45). Dickerson attempted to get in the car, and Balasz

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* Moses Young was charged in a separate indictment, 73 Cr. 812, filed August 22, 1973. He was tried before Judge Brieant and a jury on March 12-14, 1974 and acquitted.

** Subsequent laboratory analysis proved the "machine gun" was merely a semi-automatic rifle (Tr. 36).

attempted to prevent this by pushing the car door closed (Tr. 45). As Balasz tried to close the door, Dickerson jerked it open against him, attempted to kick Balasz and finally punched Balasz (Tr. 46). Simultaneously, Young grabbed Balasz from behind, spun him around and began punching him while Dickerson continued the assault (Tr. 47). About 20 to 30 seconds (Tr. 54) into the fight, Balasz announced he was a police officer, said that Young and Dickerson were under arrest and attempted to draw his pistol (Tr. 47). Nevertheless, the assault continued (Tr. 48). As Balasz drew his gun, it was knocked to the ground, prompting Young to flee and Dickerson to throw the $500 at Balasz and to state he didn't know Balasz was a cop and if he had known he would not have done anything like he did (Tr. 48-50).

Sykes remained in the front seat of the car, where he was arrested, with the rifle in his lap during the time Dickerson and Young were assaulting Balasz (Tr. 55, 71).

On cross-examination, Balasz testified that Dickerson and Sykes tried to rip him off by Dickerson taking the $500 and Sykes keeping the "machine gun" (Tr. 53).

The Defendant's Case

Dickerson admitted that the manager of Venable's Fresh Fruit Market, Bob Barry, approached him to see if he knew anyone who had guns (Tr. 126) and that Dickerson offered to try to find that person. However, he denied meeting Agents Balasz or Carroll before doing so (Tr. 141).

Dickerson contacted Young, who had the "machine gun" and put it in the car (Tr. 127). Later, at 127th Street, Balasz got into the rear seat of the car with Dickerson. Balasz examined the gun, and Dickerson picked up the $500 (Tr. 145), but Dickerson never had the rifle in his possession (Tr. 134-135). Balasz left the car with Young. Dickerson, holding the $500, remained in the car

with Sykes (Tr. 130). When Dickerson left the car shortly thereafter, Sykes was holding the "machine gun" (Tr. 131). Dickerson walked in front of the car and said he was going back uptown (Tr. 131). Young said he was going also and Dickerson asked to hold the car keys (Tr. 131). As Dickerson went to get in the car, Balasz slammed it on Dickerson's hand and Dickerson asked Balasz what he was doing. Dickerson never struck Balasz (Tr. 134-135). Then out of the corner of his eye, Dickerson saw a scuffle between Young and Balasz and got in the car (Tr. 131). At that time, Sykes was holding the rifle (Tr. 151). Once in the car, Dickerson saw an agent approach him, pistol drawn, so he got out of the car. As he did so, he was attacked by Balasz (Tr. 131-132). Balasz did not identify himself as a police officer but asked for the $500, which Dickerson returned, thinking Balasz was a stick-up man (Tr. 132-133).

ARGUMENT

POINT I

The trial judge's instructions on the theory of vicarious liability were sufficient.

Dickerson's primary argument on this appeal is that the trial judge's instructions on the theory of vicarious liability were so inadequate as to warrant a new trial. To prevail, Dickerson must show that the instructions were so woefully insufficient as to constitute "plain error", for, as his brief implicitly concedes, those exceptions as were taken by his counsel below (Tr. 196-199, 252) were both lacking in merit and, in any event, did not articulate the grounds raised now on appeal for the first time. Rule 30, Fed. R. Crim. P.; *United States* v. *Pinto*, Dkt. No. 74-1202 (2d Cir., July 31, 1974), slip op. at 5098; *United States* v. *Brawer*, 482 F.2d 117, 130 n. 18 (2d Cir. 1973);

United States v. *Pelligrino*, 470 F.2d 1205, 1209 (2d Cir. 1972), *cert. denied*, 411 U.S. 918 (1973); *United States* v. *Contreras*, 446 F.2d 940, 942 (2d Cir. 1971). For the reasons that follow, the Government submits that the question of Dickerson's liability as a joint venturer for the assault of Agent Balasz was fairly put to the jury and that its verdict, if it rested upon hat ground, is fully supported by the evidence.

A. The Evidence

Much of Dickerson's argument on appeal is premised on the wholly incorrect notion that the evidence established no understanding between Dickerson, Sykes and Young to use force, as distinct from fraud, in their scheme to obtain Balasz' money without giving him the "machine gun" in return. A brief review of the Government's proof puts that claim to rest.

According to Balasz' testimony, on July 27, 1973, he was introduced to Dickerson at a fruit market on 127th Street in Manhattan and promptly arranged to buy a "machine gun" and two magazines of ammunition from him for $500. Balasz and his partner Carroll met Dickerson near the same place later that afternoon to complete the purchase. While Carroll waited in a car some distance away, Balasz and Dickerson got into the back seat of a car, the front seat of which was occupied by Sykes and Young. Dickerson handed Balasz an M-1 carbine, and Balasz took $630 from his pocket, counted out $500 and put it on the floor of the car. When Balasz remarked that the bolt of the carbine seemed broken, Sykes reached over and took the weapon, offering to show Balasz how to fix it. Balasz briefly and unsuccessfully tried to bid the price down and then signaled to Carroll to drive his car up so that he could pass the carbine to Carroll through the car window. Dickerson and Young both protested that Carroll seemed too nervous and would attract the police, and they insisted that Carroll drive away, which he did. Dickerson

took the $500 off the car floor and got out. Sykes then pointed the carbine, which was loaded, at Balasz and demanded $500. Balasz left the car, approached Dickerson and demanded either the money or the gun, but Dickerson denied that he had the money. Balasz attempted to grab the carbine from Sykes but was elbowed away. Dickerson then called to Young, who had left the car, to throw him the car keys. Young did so, and Dickerson attempted to get into the driver's seat. Balasz tried to stop him and Dickerson struck Balasz. Young then grabbed Balasz, and he and Dickerson continued to beat Balasz, who attempted to draw his pistol and identified himself as a police officer. The pistol was knocked from his hand, but when Dickerson saw it he threw the $500 back at Balasz.

From the foregoing it seems clear beyond any question that Dickerson, Sykes and Young were partners in a joint criminal venture that specifically contemplated assaultive conduct. It is apparent—indeed virtually conceded by Dickerson's arguments on appeal—that there was never any intention to let Balasz have the carbine. This is established by the insistence of Dickerson and Sykes that Carroll leave when Carroll pulled his car up to take the carbine through the window. Dickerson said that Caroll's nervousness would attract the police, but, in the absence of the transfer to Carroll's car through the window of Dickerson's car, the only other way Balasz could have departed with the gun would have been to get out of Dickerson's car onto West 127th Street in broad daylight with the gun in his hand, a maneuver which was far more likely to attract police attention to Dickerson's car. Rather, it is obvious that Dickerson and the others never intended that the weapon should leave their car and that the purpose Dickerson and Young had in causing Carroll's departure was to make it easier to victimize Balasz, which they promptly proceeded to do.

Dickerson immediately got out of the car with Balasz' money in his pocket, and Sykes, demanding payment, leveled the loaded carbine at Balasz as soon as Balasz said he was going to take it and go. When Balasz got out and asked Dickerson for his money, Dickerson denied having it. It is inconceivable that any of this occurred except by pre-arrangement between Dickerson and the others, for Sykes refused to give up the gun, demanding that Balasz pay for it, and Dickerson denied that he had Balasz' money when in fact he did. That they intended to menace Balasz as part of the plan to keep the gun and the money is plain—before the fight on the sidewalk Dickerson and Young had gotten rid of Carroll and Sykes had pointed the loaded carbine at Balasz. Indeed, given the circumstances of the transaction the "rip-off" had to contemplate the threat or use of force—Dickerson and the others can hardly have believed that a hippie (as Balasz pretended to be) in the market for a machine gun in Harlem could be separated from $500 of his money in such a manner without making a violent attempt to get the gun or his money back, which, for the scheme to succeed, had to be countered either by force or the threat to use it. Dickerson and the others obviously knew that, for though Dickerson attempted to abscond peacefully with the money, Sykes and Young, as all must have realized beforehand, were still confronted with the fact that Balasz was inside their car wanting to take the carbine, a situation Sykes had to take control of by pointing the loaded carbine at Balasz. Balasz' reaction thereafter, and the melee which followed, was certainly the natural result of what Dickerson and the others had done, and would probably have been more violent had Balasz been what he pretended to be.

B. The Charge

Judge Brieant charged the jury in an unexceptionable manner concerning the elements of Section 111 of Title 18, United States Code, the first part of his charge presupposing a resolution by the jury of the sharp factual dispute

in the testimony of Balasz and Dickerson over whether Dickerson had himself struck Balasz. The second part of Judge Brieant's charge instructed the jury that Dickerson might be found guilty if he were a member of a joint venture in furtherance of which one of its members had assaulted Balasz.* Specifically, Judge Brieant charged the jury:

> "Now, in addition to the contentions I have previously mentioned, the Government relies on another separate additional and perhaps different theory of law in this case, entirely separate and independent of the statute about which I have just instructed you. It contends that the defendant is guilty of the substantive offense charged in the indictment. Even if he personally did not assault Special Agent Balasz because, they contend, the assault was committed in furtherance of and during the course of an unlawful criminal venture of which the defendant was a member.
>
> The Government further contends that the object of the criminal venture was larceny by trick, false pretense, false promise or other means in violation of the laws of the State of New York, that is, that the defendant Dickerson, acting jointly or as partner with Moses Young and Julius Sykes, was engaged in a criminal venture. That is, that they intended, after taking the money of Balasz and Carroll for the sale of a gun and ammunition, to keep both the money and the gun. If this was their intention, that would be larceny and anybody who does such a thing knowingly and willfully would be engaged in a criminal venture.

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* Judge Brieant's instructions were obviously patterned after the portion of his charge found sufficient to sustain the substantive convictions of Feola and Rosa on rehearing in *United States* v. *Alsondo*, 486 F.2d 1339, 1346 (2d Cir. 1973), *cert. granted as United States* v. *Feola*, 42 U.S.L.W. 3504 (April 14, 1974).

> Now, a joint criminal venture is liable for the acts and statements of his co-venturers, provided they were made within the scope of the unlawful agreement, as he saw it, during the pendency of the venture and in furtherance of its objectives and while this defendant was a party to this illegal scheme.
>
> To find the defendant guilty of the crime charged under this alternative theory, you must find beyond a reasonable doubt, first, that another person, in this case Moses Young or Julius Sykes, committed the assault charged and was a member of the illicit criminal venture.
>
> Second, that the defendant knowingly and willfully became and was at the time of the assault a member of the venture.
>
> And third, that the assault was committed in furtherance of the venture or its object.
>
> In considering this theory you may rely on and consider the defendant's own testimony here to the effect that the scuffle was between Young and Balasz" (Tr. 240-242).

Dickerson claims that these instructions were insufficient because: (1) they failed to define the elements of larceny; (2) they provided for conviction for an assault upon a finding by the jury of a joint venture to commit larceny, which he claims involves no use of force, and there was no evidence to support a finding that the venture contemplated an assault; and (3) that as a matter of law Dickerson could not be guilty of an assault committed in furtherance of a scheme, of which he was a member, to commit a larceny. For the reasons that follow, we submit that none of the grounds asserted warrant reversal of the conviction.

The first contention—that the trial judge failed adequately to define the elements of larceny—is unworthy of extended discussion. Judge Brieant's definition of the predicate joint venture here was accurate under New York law and certainly no less detailed than that approved in *Alsondo,* and thus it adequately put the matter to the jury. Judge Brieant did not "assume" the commission of the larceny (Dickerson Br. at 13). Rather, to paraphrase briefly, he specifically stated that the Government contended that Dickerson was a member of a joint criminal venture with Young and Sykes to commit larceny by false pretenses by taking Balasz' money for a gun and ammunition which they had no intention of giving him, and that, to convict, the jury had to find that Dickerson was a member of such a venture at the time that an assault on Balasz was committed in furtherance of it by another of its members. While claiming that the instruction was deficient on this point, Dickerson suggests neither what more should have been said or how he was in any way prejudiced.

Dickerson's next argument is that Judge Brieant's "*Alsondo*" charge was inapposite, given the claimed lack of evidence of an agreement to use force or threats of force on Balasz. The short answer to the contention is that, as already shown above, the criminal venture between Dickerson, Sykes and Young could not have succeeded without the actual or threatened use of force. And although their scheme may have contemplated the actual taking of Balasz' money by fraud and not by force or threats of force, they knew it was still necessary for them to get Balasz out of their car without giving him the carbine he had paid for, which they plainly planned to do by pointing the loaded carbine at him, at a minimum.*

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* Dickerson correctly points out (Br. at 15 n. 1) that the Government did not contend below that the pointing of the loaded carbine at Balasz was the assaultive behavior charged

[Footnote continued on following page]

Dickerson makes a further point that the judge should have instructed the jury in terms of robbery rather than larceny, since, it is said, larceny is defined in New York law as a taking not involving the use of force or intimidation. However, while this argument might have some technical merit for *Alsondo* purposes had the contentions of the parties below been different, it is clear that in this case it had no relevance at all, a point made all the more certain by the fact that no exception to the Judge's charge was taken on this ground. The Government's evidence established that Dickerson and the others were engaged in a criminal scheme to obtain Balasz' money for the carbine without handing it over afterwards while using the threat of force to get rid of Balasz, and that when Balasz attempted to get his money back Dickerson and Young had beat him. Dickerson, on the other hand, testified that he merely acted as a go-between for Balasz and Young, who owned the gun, in a bona fide transaction, and such assaultive conduct as occurred was on the part of Balasz, whom Dickerson swore he never struck, and Carroll. Thus, the issue for the jury was not

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in the indictment, preferring to rely on the physical blows administered to Balasz by Dickerson and Young. However, the question here is whether Dickerson understood that he was participating in a criminal scheme which required for its successful completion the use or threat of force. That it was agreed that Balasz would be threatened with the loaded carbine while Dickerson made good his departure with the money seems indisputable. While it is possible that Dickerson and the others thought that pointing a loaded carbine at Balasz would be enough to frighten him off and that they would never come to blows with him, the question for *Alsondo* purposes is whether they contemplated an assault of any kind, and the pointing of the loaded carbine at Balasz was clearly intended to be assaultive. *United States* v. *Bamberger*, 452 F.2d 696 (2d Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972). The fact that the conduct the Government relied on as assaultive only occurred when the menacing with the carbine proved ineffectual is irrelevant to whether Dickerson and the others contemplated assaultive conduct—pointing a loaded gun—to accomplish their criminal design.

whether Dickerson was part of a criminal venture contemplating fraud but not force; rather, it was whether Dickerson had been knowingly involved in any kind of criminal venture at all.

Dickerson's final point is that as a matter of law a joint criminal venture to commit a larceny without assault cannot create liability for the joint venturers for an assault committed in furtherance of the venture by one of its number. This issue, we submit, is not presented here, since the criminal design of Dickerson and the others clearly necessarily intended assaultive conduct for the success of the venture. Nevertheless, Dickerson's proposition of law is clearly wrong and indeed it is clear that under *Pinkerton* v. *United States*, 328 U.S. 640 (1946), Dickerson's conviction should stand even if Judge Brieant's charge on a theory of larceny rather than robbery makes this case distinguishable from *Alsondo*.

Pinkerton permits conviction for a substantive crime if at the time of its commission the defendant was a party to an unlawful conspiracy and the substantive offense was committed in furtherance of it. *Id.*, 328 U.S. at 645. See also *United States* v. *Cantone*, 426 F.2d 902, 904 (2d Cir.), *cert. denied*, 400 U.S. 827 (1970); *Gradsky* v. *United States*, 376 F.2d 993, 996 (5th Cir.), *vacated in part on other grounds as Roberts* v. *United States*, 389 U.S. 18, *cert. denied in part as Grene* v. *United States*, 389 U.S. 908 (1967). This liability exists even if the defendant was wholly unaware of the commission of these substantive crimes and in no way participated in them. *United States* v. *Owen*, 492 F.2d 1100, 1104-1105 (5th Cir. 1974); *United States* v. *Addonizio*, 449 F.2d 100, 102 (3d Cir. 1971), *cert. denied as Gordon* v. *United States*, 404 U.S. 1058 (1972). Here, assuming the accuracy of Dickerson's contentions concerning the effect of the submission of the case on the basis of a scheme to commit larceny rather than robbery, it is certainly clear that the jury, if their verdict was not based on a finding that Dickerson had himself struck Balasz,

found that he was a member of a scheme to steal Balasz' money and that Balasz was assaulted in furtherance of the scheme by one of its other members. Here, the assault was necessary to the success of the scheme and, if not expressly planned, certainly foreseeable under the circumstances.* Accordingly, Dickerson was substantively liable under *Pinkerton* for the assault, even if committed by Young in furtherance ** of a conspiracy to commit larceny of which Dickerson was a member. *United States* v. *Bynum*, 485 F.2d 490, 498-499 (2d Cir. 1973), *vacated on other grounds*, ——— U.S. ———, 42 U.S.L.W. 3646 (May 28, 1974); *United States* v. *Etheridge*, 424 F.2d 951, 964-965 (6th Cir.), *cert. denied*, 400 U.S. 993 (1971).*** See also *United States* v. *Kissel*, 218 U.S. 601 (1910). The *Pinkerton* doctrine might not apply ". . . if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the

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* While the trial judge did not put the question of foreseeability to the jury, Dickerson's failure to except on that ground forecloses the claim on appeal. *United States* v. *Edwards*, 366 F.2d 853, 869 (2d Cir. 1966), *cert. denied as Jakob* v. *United States*, 386 U.S. 908 (1967); *United States* v. *Roselli*, 432 F.2d 879, 894 n. 25 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971).

** Dickerson makes the further argument, relying on *Grunewald* v. *United States*, 353 U.S. 391 (1957) and *Krulewitch* v. *United States*, 336 U.S. 440 (1949), that the beating of Balasz could not have been in furtherance of the conspiracy because Dickerson had already taken his money before the beating. However, while the state law crime of larceny may have been completed before the beating, the "central aim" of the conspiracy had certainly not been accomplished while Balasz was actively resisting the attempted "rip-off". *United States* v. *Grant*, 494 F.2d 145, 155-156 (2d Cir. 1974).

*** Neither *Bynum* and *Etheridge* involve substantive convictions but instead discuss the liability of co-conspirators for murder and other such crimes by other co-conspirators in furtherance of conspiracies to sell narcotics and rob banks, respectively. The absence of substantive counts in *Bynum* clearly arises from the fact that the additional crimes there involved were not prosecutable in federal court, and the principle of liability is the same.

scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably be foreseen as a necessary or natural consequence of the unlawful agreement". *Pinkerton* v. *United States, supra,* 328 U.S. at 647-648. But that is clearly not the situation here.

POINT II

Dickerson was not prejudiced by the modified *Allen* charge.

Dickerson alleges that he was prejudiced by Judge Brieant's statement in the modified *Allen* charge that "[Judge Brieant] was sure the defendant would want the matter resolved" (Br. at 21). Although Dickerson has failed to show how he was prejudiced by such remark and the speculation and truisms of Dickerson's argument do not fill that void, his failure to object at trial to the portion of the *Allen* charge now in question and his failure to allege or prove "plain error" affecting substantial rights alone preclude his raising the issue on appeal. *United States* v. *Pinto, supra; United States* v. *Brawer, supra,* 482 F.2d at 130 n. 18; *United States* v. *Pelligrino, supra,* 470 F.2d at 1209; *United States* v. *Martinez,* 446 F.2d 118, 120 (2d Cir.), *cert. denied,* 404 U.S. 944 (1971); *United States* v. *Contreras, supra,* 446 F.2d at 942.

In any event, Dickerson's claim is without merit. The challenged portion of Judge Brieant's modified *Allen* charge included the following

> "It is desirable from the viewpoint of both the government and the defendant that this case be disposed of. The government has an interest in seeing that the law is enforced. The defendant has gone through a trial here that is an ordeal and he

> is entitled to have a verdict, if it is possible, be it guilty or not guilty.
>
> I am sure that would be his preference one way or the other, but, of course, I say that without consulting him.
>
> * * * * *
>
> "I am sure that the defendant and the government would prefer to put an end to the matter if, and only if, you can conscientiously do so" (Tr. 265).

In this respect Judge Brieant's *Allen* charge virtually tracks the language of an *Allen* charge by Judge Weinfeld which this Court has approved. *United States* v. *Hynes*, 424 F.2d 754, 757 and n. 2 (2d Cir.), *cert. denied*, 399 U.S. 933 (1970); see also *United States* v. *Kahaner*, 317 F.2d 459, 483 (2d Cir. 1963). That Dickerson would have preferred a second trial for personal or tactical reasons is in no way shown by the record. *Cf. United States* v. *Domenech*, 476 F.2d 1229, 1231-1232 (2d Cir.), *cert. denied*, 414 U.S. 840 (1973).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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October 18, 1974

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